FILE COPY

FILED
SEP 27 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term 1968

No. ~~586~~ #7

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

On Appeal From The United States District Court
For The Southern District of New York

JURISDICTIONAL STATEMENT

Victor Rabinowitz,
Leonard B. Boudin,
30 East 42nd Street,
New York, New York 10017,
Attorneys for Plaintiffs-Appellants.

Dorian Bowman
of Counsel.

September 27, 1968

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Statutes Involved	3
Questions Presented	3
Statement of the Case	4
The Questions are Substantial	6
Conclusion	15
Appendix	
Statutes Involved	1a
Order Extending Time to Docket Appeal	4a
Opinion of the District Court	5a

Citations

Cases:

Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511	14
Anderson v. Martin, 375 U.S. 399	3
Baggett v. Bullitt, 377 U.S. 360	8
Baines v. City of Danville, 337 F. 2d 579 (4th Cir. 1964), *cert. denied* 381 U.S. 939	14

Cases (Continued): Page

Baker v. Bindner, 274 F. Supp. 658 (W.D. Ky. 1967) 13

Bouie v. City of Columbia, 378 U.S. 347 ..... 9, 10

Braden v. Commonwealth, 291 S.W. 2d 843 (1956). . . 11

Brooks v. Briley, 274 F. Supp. 538 (M.D. Tenn. 1967) 14

Cameron v. Johnson, 262 F. Supp. 873 (S.D. Miss. 1966), *aff'd* 390 U.S. 611 ..... 6, 14

Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1967) 9

Commonwealth v. Gilbert, 334 Mass. 71 134 N.E. 2d 13 (Sup. Jud. Ct. 1956). 11, 12

Cooper v. Hutchinson, 184 F. 2d 119 (3d Cir. 1950) 13-14

DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 12

Dennis v. United States, 341 U.S. 494 ..... 6, 7, 8, 10

Dombrowski v. Pfister, 380 U.S. 479 ..... 3, 8, 9, 14

DuBois Clubs v. Clark, 389 U.S. 309 8

Goss v. State of Illinois, 312 F. 2d 257 (7th Cir. 1963) 14

Harper v. Virginia Board of Elections, 383 U.S. 663 ..... 6, 13

Harris v. Younger, 281 F. Supp. 507 (C.D. Cal. 1968) 10

James v. United States, 366 U.S. 213 9

Keyishian v. Board of Regents, 385 U.S. 589 ..... 7, 8, 9

Cases (Continued): Page

Labat v. Bennett, 365 F. 2d 698 (5th Cir. 1966) 13

Lanzetta v. New Jersey, 306 U.S. 451 9

Luther v. Borden, 7 How. (48 U.S.) 1 12

McSurely v. Ratliff, Civ. Action 1146 (E.D. Ky. Oct. 18, 1967) 11, 14

Monroe v. Pape, 365 U.S. 167 14

N.A.A.C.P. v. Button, 371 U.S. 415 8

Pennsylvania v. Nelson, 350 U.S. 497 ..... 6, 11

People v. Epton, 19 N.Y. 2d 496, 281 N.Y.S. 2d 9, *cert. denied and appeal dismissed* 390 U.S. 29 ..... 5, 6, 7, 8, 10, 11

People v. Ferguson, 55 Misc. 2d 823 (N.Y. Sup. Ct., 1968) 6, 12

People v. Gitlow, 234 N.Y. 132, *aff'd* 268 U.S. 652 ..... 6, 11, 12

Porter v. Dicken, 328 U.S. 252 14

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 11

Thiel v. Southern Pacific Co., 328 U.S. 217 13

Touhey v. New York Life Ins. Co., 314 U.S. 118 14

Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486 (W.D. Pa. 1957) 13

Uphaus v. Wyman, 360 U.S. 72 12

Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967) 9, 14

Yates v. United States, 354 U.S. 298 ..... 6, 7, 10

Citations (Continued): Page

United States Constitution:

First Amendment 4, 7, 14
Fifth Amendment 4
Fourteenth Amendment 2, 4, 13

Statutes:

Communist Control Act of 1954,
50 U.S.C. §841 11
Internal Security Act of 1950,
50 U.S.C. §781 *et seq.* 11
Smith Act, 18 U.S.C. §2385 . . . . . 2, 4, 5, 11, 12
28 U.S.C. §1253 3
28 U.S.C. §2283 . . . . . 3, 13, 14
42 U.S.C. §1983 . . . . . 3, 13, 14
New York Civil Service Law, §105 7
New York Judiciary Law, §596(3) 2, 3, 4, 5, 13
New York Penal Law
§160 . . . . . 2, 3, 4, 7
§161 . . . . . 2, 3, 4, 7, 11
§163 . . . . . 2, 3, 4
§240.15 2
§580(1) 2, 3, 4

Miscellaneous:

Note, *The Dombrowski Remedy*,
21 Rutgers L. Rev. 92 14

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No.

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

On Appeal From The United States District Court
For The Southern District of New York

JURISDICTIONAL STATEMENT

George Samuels, Abraham C. Taylor, Herman Benjamin Ferguson, Arthur Harris, Mandola McPherson, Max Stanford, Merle Stewart, Hampton Woodward Rookard, Ursula Virginia West and Milton Ellis, having appealed from a judgment of a three-judge statutory court of the Southern District of New York entered on June 27, 1968 dismissing their complaint, submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion of the three-judge statutory court, as yet unreported, is appended hereto, *infra*, pp. 5a-20a.

Jurisdiction

Plaintiffs filed a complaint in the Southern District of New York, alleging that former §§160, 161, 163 and 580(1) of the Penal Law of New York violate constitutional guarantees of free speech, press and assembly;[1] that former §§160, 161 and 163 are unconstitutional in that they were superseded by 18 U.S.C. §2385 (the Smith Act); and that former §596(3) of the Judiciary Law of New York violates the due process and equal protection clause of the Fourteenth Amendment.[2]

They seek to enjoin the defendants from enforcing against them the above-mentioned sections of the Penal Law and from continuing to prosecute them under an indictment charging plaintiffs with a violation of these sections.

On application of plaintiffs, a three-judge statutory court was convened. On June 26, 1968, the court dismissed the complaint and a judgment to that effect was entered on June 27. The judgment was entered by the Clerk of the court on the last page of the court's opinion, *infra*, p. 18a.

---

[1] The Penal Law was amended effective September 1, 1967. All references are to the former provisions of the Penal Law. Criminal Anarchy is now covered by Sec. 240.15 of the new Penal Law which reads as follows: "A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow."

[2] Former Sec. 596(3) has been repealed, effective September 1, 1967. Although the indictment was returned on or about January 17, 1968, the grand jury which returned the indictment was selected when former Sec. 596(3) was in effect.

On July 15, 1968 a notice of appeal to this Court from the decision of the court below was filed in the Southern District of New York. On September 5, 1968 Mr. Justice Harlan extended plaintiffs' time to docket the appeal to September 27, 1968; the order is appended hereto, *infra*, p. 4a.

Jurisdiction of this appeal is conferred by 28 U.S.C. §1253. The following cases sustain the Court's jurisdiction: *Dombrowski* v. *Pfister*, 380 U.S. 479; *Anderson* v. *Martin*, 375 U.S. 399.

Statutes Involved

The principal statutes involved are former §§160, 161, 163 and 580(1) of the Penal Law of New York and former §596(3) of the Judiciary Law of New York. These statutes are set forth, *infra*, pp. 1a-3a.

Questions Presented

(1) Are former §§160, 151, 163 and 580(1) of the Penal Law of New York, forbidding the advocacy of the violent overthrow of organized government, unconstitutionally vague and overbroad both on their face and as applied by the New York courts?

(2) Does federal legislation in the field of sedition preempt New York State from enacting a statute which purports to forbid advocacy of the overthrow of the Government of New York State?

(3) Does former §596(3) of the Judiciary Law of New York, establishing a monetary qualification for grand jury service, violate the Fourteenth Amendment?

(4) Is an action brought under 42 U.S.C. §1983 an exception to the prohibition against federal injunctions of state court proceedings contained in 28 U.S.C. §2283?

Statement of the Case

Plaintiffs are residents of the City and State of New York. On or about June 12, 1968, an indictment was filed in the Supreme Court, County of Queens, charging them, *inter alia*, with having violated New York's Criminal Anarchy Law, former §§160, 161, 163 and 580(1) of the Penal Law of New York. Plaintiffs were also charged in various counts with the illegal possession of weapons. This indictment was subsequently dismissed and on or about January 17, 1968, a new and similar indictment (No. 134-68) was filed against them.

On or about March 12, 1968, plaintiffs[3] filed a complaint in the Southern District of New York, alleging, *inter alia*, that the Criminal Anarchy Law was void on its face and as applied to them in that it violated the First, Fifth and Fourteenth Amendment guarantees of free speech, press and assembly (Para. 10). In addition, the complaint alleged (Para. 10) that said law was unconstitutional since it had been superseded by 18 U.S.C. §2385 (the Smith Act). The complaint also alleged (Para. 13) that former §596(3) of the Judiciary Law, governing the selection of grand jurors, violated the Fourteenth Amendment by requiring a $250.00 monetary qualification for grand jury service.

The plaintiffs also moved for the convening of a three-judge court and for a temporary injunction to enjoin defendants from continuing to prosecute them. The matter was duly referred to a three-judge court.

After defendants had filed an answer, the plaintiffs moved for summary judgment. On June 26, 1968 the court, relying

---

[3] The indictment in the Supreme Court, County of Queens, was returned against 15 people. Only 10 of them became plaintiffs in the present action. A similar action was started in the Eastern District of New York by Fred Fernandez, one of the other persons named in the indictment. That action was subsequently transferred to the Southern District and consolidated with this action.

mainly upon *People* v. *Epton*, 19 N.Y. 2d 496, 281 N.Y.S. 2d 9, *cert. denied and appeal dismissed* 390 U.S. 29, dismissed the complaint, holding that the former sections of the Penal Law under attack were constitutional and had not been superseded by the Smith Act. In addition, the court, relying upon defendants' affidavit stating that the $250.00 monetary qualification for grand jury service had not been utilized, upheld the validity of former §596(3). A judgment dismissing the complaint was entered on June 27, 1968 and an appeal to the United States Supreme Court was filed in the District Court on July 15, 1968.

The District Attorney of Queens has consented to the entry of an order staying him from prosecuting the plaintiffs pending disposition of their case by this Court.

The Questions Are Substantial

This appeal raises questions regarding the constitutionality of New York's Criminal Anarchy Law, which was upheld by this Court over 40 years ago in *People* v. *Gitlow*, 234 N.Y. 132, *aff'd* 268 U.S. 652, a decision which has little validity today. *See Dennis* v. *United States*, 341 U.S. 494, 507; *Yates* v. *United States*, 354 U.S. 298, 318; *People* v. *Epton*, *supra*, at 504-505; *People* v. *Ferguson*, 55 Misc. 2d 823, 831 (N.Y. Sup. Ct., 1968).

The appeal also raises the question of whether federal legislation has pre-empted the field of sedition, thereby foreclosing the states from enacting statutes in this field. *See Pennsylvania* v. *Nelson*, 350 U.S. 497.

The appeal finally presents a question regarding the constitutionality of a provision of New York's former Judiciary Law establishing a monetary qualification for grand jury service, a provision not dissimilar to that struck down in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663.

Should this Court hold any of the above New York statutes to be unconstitutional, an important subsidiary question of Federal-State relations would be presented; namely, whether federal courts have the power to enjoin pending state prosecutions. In *Cameron* v. *Johnson*, 390 U.S. 611, the Court did not reach this question.

1. New York's Criminal Anarchy statute was enacted in 1902, but was not the basis for any reported prosecution until *People* v. *Gitlow*, *supra*, in 1920. There the New York Court of Appeals construed the statute as requiring for conviction no more than advocacy of force and violence and held that the likelihood of any substantive action need not be shown. This Court affirmed over the dissents of Justices Holmes and Brandeis.

Although the *Gitlow* decision has never been expressly overruled, subsequent decisions of this Court construing the First Amendment have made clear that it no longer correctly states the law. *Dennis* v. *United States*, *supra*, at 507, and *Yates* v. *United States*, *supra*, at 318.

Any doubts that may have remained concerning the constitutionality of the Criminal Anarchy statute were laid to rest in *Keyishian* v. *Board of Regents*, 385 U.S. 589, where this Court examined former §§160 and 161 of the New York Penal Law in its consideration of the constitutionality of New York's program to prevent the retention of "subversive" persons in the educational system of the State. In holding that program unconstitutional, the Court strongly indicated, at p. 599, that §161 was unconstitutionally vague.

In commenting on §105, Subd. 1(a) of the Civil Service Law, which contained language similar to §161(1) of the Penal Law, the Court stated, at pp. 599-600:

> This provision is plainly susceptible of sweeping and improper application. It may well prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims.

The court below relied upon *People* v. *Epton*, *supra*, to sustain the validity of the New York law. In *Epton*, the New York Court of Appeals, although recognizing that *Gitlow* no longer correctly stated the law, 19 N.Y. 2d at 504-505, saved the excessively broad provisions of the 1902 law by the presumption that the 1902 legislature intended to meet the constitutional standards set forth half a century later in *Dennis*. The court accordingly held that the law required not merely

advocacy of violent overthrow but also a clear and present danger that the overthrow may be attempted, and was hence constitutional, 19 N.Y. 2d at 506.

The *Epton* decision was incorrect for three reasons.

First, there is a serious question whether, in light of recent decisions of this Court, *Dennis* v. *United States*, *supra*, is viable today. This Court has been vigilant in requiring that a statute dealing with free speech be narrowly drawn so that "men of common intelligence" need not "guess at its meaning and differ as to its application. . ." *Baggett* v. *Bullitt*, 377 U.S. 360, 367. First Amendment freedoms may be regulated "only with narrow specificity," *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433. This Court has not hesitated to strike down statutes when these standards have not been met. See *Baggett* v. *Bullitt*, *supra*; *Keyishian* v. *Board of Regents*, *supra*. These standards are not met by the statutes under consideration in *Dennis* and in this case. "It is not conceivable that the Court that decided *Dombrowski* v. *Pfister*, 380 U.S. 579, would approve *Dennis*." Douglas, J., dissenting, with Black, J., in *DuBois Clubs* v. *Clark*, 389 U.S. 309 at 317.

The philosophy of *Dombrowski*, *Keyishian*, *Baggett* and other cases is inconsistent with a statute which, on its face, appears to prohibit mere advocacy. It is no answer to say that a Court will "construe" the statute to require more than advocacy. For all we know, the Louisiana court might have "construed" the statute in *Dombrowski* to conform to constitutional standards. The very existence of such statutes is an unconstitutional inhibition on the exercise of free speech. Contrary to what the *Dennis* court held, 341 U.S. at 515, it makes a great deal of difference whether the limiting construction is contained "*in haec verba* within the statute, or whether it is the judicial measure of constitutional applicability." The

difference is in the effect on those who seek to exercise their free speech rights, but are unwilling to gamble on how a court may construe a statute. See *Ware* v. *Nichols*, 266 F. Supp. 564 (N.D. Miss. 1967) and *Carmichael* v. *Allen*, 267 F. Supp. 985 (N.D. Ga. 1967) holding similar statutes to be unconstitutional.

Second, the construction of the statute by the court in *Epton* violates due process by not affording plaintiffs fair warning of the limiting construction. In *Lanzetta* v. *New Jersey*, 306 U.S. 451, defendants were convicted under a broadly worded statute, prior to a state decision which had placed a limiting construction on the statute. In the course of reversing the convictions, this Court declared, at p. 456:

> Appellants were convicted before the opinion in State v. Gaynor. It would be hard to hold that, in advance of judicial utterance upon the subject, they were bound to understand the challenged provision according to the language later used by the court.

That lack of fair warning of a state-court construction of a statute constitutes a violation of due process was most recently recognized by this Court in *Bouie* v. *City of Columbia*, 378 U.S. 347. There the Court stated, at pp. 354-355:

> When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.

See opinion of Warren, C.J., concurred in by Brennan and Stewart, JJ., in *James* v. *United States*, 366 U.S. 213.

The holdings of *Keyishian* v. *Board of Regents*, *supra*, and *Dombrowski* v. *Pfister*, *supra*, together with the non-

enforcement of the law for over 40 years justifiably led the plaintiffs (and Epton) to assume that the law was a dead letter. To charge plaintiffs with criminal conduct which up to the time of the *Epton* opinion was prohibited only by a concededly unconstitutional statute violates the very essence of due process[4] and operates as an *ex post facto* law. See *Bouie* v. *City of Columbia, supra,* at pp. 353-354.

Third, the court's action in reinterpreting the statute constitutes an exercise of legislative power. The court has, in effect, amended the statute to accord with recent decisions of this Court. To hold that the Legislature, in enacting the Criminal Anarchy Law in 1902, intended to comply with the constitutional standards of *Dennis* v. *United States, supra,* and *Yates* v. *United States, supra,* is carrying a legal fiction to the point of absurdity. *Cf. Harris* v. *Younger*, 281 F. Supp. 507 (C.D. Cal. 1968), where the court in a situation similar to that presented herein adopted a contrary approach in interpreting California's Sedition statute.

Plaintiffs may well be denied the opportunity of ever raising these important questions in this Court. The state, as it did in *People* v. *Epton, supra,* has charged defendants, in one indictment, not only with crimes under the Criminal Anarchy Law but also with crimes which are not subject to attack on constitutional grounds. Thus, by having an adequate state ground to support a conviction, review by a federal court of the allegedly unconstitutional criminal statute will be foreclosed and its inhibiting effect on the exercise of free speech will operate unhindered.

---

[4] The *Epton* decision was handed down on May 16, 1967. The indictment herein alleged that the acts of criminal anarchy occurred between October 1, 1965 and June 21, 1967, substantially all prior to the decision in *Epton.*

2. Neither the court below nor the court in *Epton* considered plaintiffs' contention that federal legislation has pre-empted the field of sedition, thereby foreclosing state action in this field.[5] The court below, *infra*, p. 11a, merely cited *People* v. *Epton*, *supra*, for the proposition that former §161 "must be confined to attempted overthrow of the government of New York or a local subdivision", despite the holding in *People* v. *Gitlow*, *supra*, at 138, that the section proscribed advocacy of the overthrow of "all organized government in this country, whether it be that of the city, state or nation." *McSurely* v. *Ratliff*, Civ. Action 1146 (E.D. Ky., Oct. 18, 1967) supports plaintiffs' position herein. See *Commonwealth* v. *Gilbert*, 334 Mass. 71, 134 N.E. 2d 13 (Sup. Jud. Ct. 1956); *Braden* v. *Commonwealth*, 291 S.W. 2d 843 (1956).

When Congress enacts legislation within an area of its competence, the field is pre-empted and the states may not act. *Pennsylvania* v. *Nelson*, *supra*; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218. Congress has pervasively occupied the field of legislation dealing with seditious activity. See the Smith Act, 18 U.S.C. §2385; Internal Security Act of 1950, 50 U.S.C. §781 *et seq.*; the Communist Control Act of 1954, 50 U.S.C. §841.

The doctrine of pre-emption bars state statutes aimed at the overthrow of state government. The Smith Act expressly covers conduct calculated to overthrow

> the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein.

---

[5] The indictment charged advocacy of the overthrow of "organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies."

These words cannot be read out of the statute. If state statutes aimed at curbing advocacy of overthrow of the United States government are superseded by the prohibition of the same behavior in the Smith Act, so must be state statutes aimed at curbing attempts to overthrow state governments, for the Smith Act treats both alike.

There is dicta in *Uphaus* v. *Wyman*, 360 U.S. 72, and *DeGregory* v. *New Hampshire Atty. Gen.*, 383 U.S. 825, which points to a contrary conclusion. However, these cases involved state contempt convictions for refusal to answer questions put by a state investigating committee, a far cry from the activities with which the plaintiffs are charged herein. The uncertainty of the exact scope of the decisions in *Uphaus* and *DeGregory* is another reason for this Court to consider the instant case.

In the context of the twentieth century, it is inconceivable that advocacy of the overthrow of government by force and violence could be limited to state and local governments. In an earlier day this might not have been the case. See *Luther* v. *Borden*, 7 How. (48 U.S.) 1. But, as the Criminal Anarchy Law, *People* v. *Gitlow*, *supra*, and *Commonwealth* v. *Gilbert*, *supra*, recognize, revolutionary movements in our time seek the overthrow of all existing government. State and local governments cannot be but incidental targets. If the states are to be permitted to prosecute acts prohibited by the Smith Act simply because overthrow of the state government is a by-product of a design to overthrow the federal government, the rule of pre-emption is reduced to a mere matter of pleading.[6]

---

[6] Indeed, that seems to have been the case in the Queens County prosecution here under attack. An earlier indictment had alleged that plaintiffs had advocated the duty of overthrowing "organized government." This indictment was dismissed. *People* v. *Ferguson*, *supra*. The grand jury thereupon found a superseding indictment alleging advocacy of the overthrow of New York State. The overt acts alleged were identical.

3. The $250.00 property qualification set forth in former §596(3) is in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. This property qualification is similar to that which this Court struck down in *Harper* v. *Virginia Board of Elections, supra.*

What the Supreme Court said with reference to the poll tax in *Harper* is equally applicable here. Poverty or affluence bear no relationship to competency to serve as a grand juror. To condition grand jury service upon a showing of monetary worth runs contrary to the very notion that the grand jury must represent a cross-section of the community.

Other courts have also recognized the principle that to automatically exclude certain economic classes from grand jury service violates the idea of a grand jury representing a cross-section of the community. See *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217; *Labat* v. *Bennett*, 365 F. 2d 698 (5th Cir. 1966).

4. Should this Court hold either New York's Criminal Anarchy Law or Judiciary Law to be unconstitutional, an important subsidiary question is presented, namely, the power of a federal court to enjoin a pending state court prosecution.

This question involves a consideration of whether 42 U.S.C. §1983 is an exception to 28 U.S.C. §2283[7]. Federal courts which have considered this question have reached different conclusions. Cases holding that §1983 is an exception to §2283 are as follows: *Baker* v. *Bindner*, 274 F. Supp. 658 (W.D. Ky. 1967); *Tribune Review Publishing Co.* v. *Thomas*, 153 F. Supp. 486 (W.D. Pa. 1957); *Cooper* v. *Hutchinson*,

---

[7] 42 U.S.C. Sec. 1983 authorizes a "suit in equity." 28 U.S.C. Sec. 2283 prohibits a federal court from granting an injunction to stay state court proceedings "except as expressly authorized by Act of Congress. . . ."

184 F. 2d 119 (3d Cir. 1950); *Ware* v. *Nichols*, *supra*, (Judge Wisdom concurring); *McSurely* v. *Ratliff*, *supra*. Cases reaching the contrary result are as follows: *Baines* v. *City of Danville*, 337 F. 2d 579 (4th Cir. 1964) (Judges Sobeloff and Bell dissenting on this point), *cert. denied* 381 U.S. 939; *Cameron* v. *Johnson*, 262 F. Supp. 873 (S.D. Miss. 1966) (Judge Rives dissenting on this point), *aff'd.* 390 U.S. 611, (without reaching the question raised here); *Brooks* v. *Briley*, 274 F. Supp. 538 (M.D. Tenn. 1967); *Goss* v. *State of Illinois*, 312 F. 2d 257 (7th Cir. 1963). For the reasons only briefly stated herein, plaintiffs urge that the former line of cases express the correct view.

First, federal courts have always recognized that there exist implied exceptions to the seemingly absolute language of §2283. See *Touhey* v. *New York Life Ins. Co.*, 314 U.S. 118, 132-134; *Porter* v. *Dicken*, 328 U.S. 252. See also *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U.S. 511. Secondly, the legislative history of §1983 indicates that it was enacted to protect the rights of the newly enfranchised citizenry and to grant them access to federal courts for the protection of these rights. See *Monroe* v. *Pape*, 365 U.S. 167; Note, *The Dombrowski Remedy*, 21 Rutgers L. Rev. 92, 109-113. §1983 must be viewed as an exception to §2283 if the purposes sought to be achieved by its enactment are to be fully implemented. Thirdly, the considerations underlying *Dombrowski* v. *Pfister*, *supra*, are equally applicable here. The danger to the free exercise of First Amendment freedoms is equally threatened by state proceedings which have been initiated as by state proceedings which have not yet been commenced. The expansion of federal court injunctive power would be undermined if §2283 is viewed as a bar to the institution of a suit under §1983.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

Victor Rabinowitz
Leonard B. Boudin

30 East 42nd Street
New York, N.Y. 10017
Attorneys for Plaintiffs-Appellants

Dorian Bowman
of Counsel

September 27, 1968

APPENDIX

	Page
Statutes Involved	1a
Order Extending Time to Docket Appeal	4a
Opinion of the District Court	5a

Statutes Involved

New York Penal Law

"§160. Criminal anarchy defined

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony."

"§161. Advocacy of criminal anarchy

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

"§163. Permitting premises to be used for assemblages of anarchists

The owner, agent, superintendent, janitor, caretaker or occupant of any place, building or room, who wilfully and knowingly permits therein any assemblage of persons prohibited by section one hundred and sixty-two, or who, after notification that the premises are so used permits such use to be continued, is guilty of a misdemeanor, and punishable by imprisonment for not more than two years, or by a fine of not more than two thousand dollars, or both."

"§580. Definition and punishment of conspiracy

If two or more persons conspire:

1. To commit a crime; or,

* * *

Each of them is guilty of a misdemeanor."

New York Judiciary Law

"§596. Qualifications of jurors

In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must:

* * *

Statutes Involved

3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value."

Order Extending Time to Docket Appeal

SUPREME COURT OF THE UNITED STATES

No. , *October Term, 1968*

GEORGE SAMUELS, ET AL.,

Appellants,

against

THOMAS J. MACKELL, District Attorney of Queens County, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including September 27th, 1968.

/s/ John M. Harlan
Associate Justice of the Supreme Court of the United States

Dated this 5th day
of September, 1968.

Opinion of the District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROCKWARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs.

against

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

---

68 Civ. 1196

FRED FERNANDEZ,

Plaintiff.

against

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

Heard May 17, 1968 before:

FRIENDLY, *Circuit Judge*, BRYAN and WYATT, *District Judges.*

APPEARANCES:

Victor Rabinowitz (Rabinowitz, Boudin & Standard, New York, N.Y.), for Plaintiffs George Samuels, Abraham C. Taylor, Herman Benjamin Ferguson, Arthur Harris, Mandola McPherson, Max Stanford, Merle Stewart, Hampton Woodward Rockward, Ursula Virginia West and Milton Ellis.

Eleanor Jackson Piel, New York, N.Y., for Plaintiff Fred Fernandez.

Peter J. O'Connor, Queens, N.Y. (Mortimer Sattler, Ass't Attorney General of New York State, New York, N.Y., Patrick J. Broderick on brief), for Defendants Thomas J. Mackell and Louis J. Lefkowitz.

FRIENDLY, *Circuit Judge:*

Plaintiffs in these consolidated actions[1] are the subjects of a superseding indictment filed by a grand jury in the Supreme Court for Queens County, New York. The indictment contains 48 counts, many of these being against only one or some of the plaintiffs. Forty-one counts charge violations of former New York Penal Law §1897[2] relating to the possession of weapons. Another count alleges conspiracy to commit arson in the third degree, Penal Law §223. What concerns us are counts charging criminal anarchy.

The first count alleges advocacy of criminal anarchy in violation of §§160 and 161-1, see fn. 4, in that defendants advocated orally and in writing the overthrow of the governments of the State and its political subdivisions "by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transpor-

tation facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished." The second count asserts that, in violation of §§160 and 160-2, defendants published and circulated certain printed matter urging the violent overthrow of the State and its political subdivisions and agencies "by force and violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers of said State and its various political subdivisions and agencies, and members of the State Guard of said State, and by other unlawful means, and with the further intent that said acts be presently attempted and accomplished." The third count charges that, in violation of §§160 and 161-4, defendants organized and helped to organize and became members of and voluntarily assembled with each other in a society formed to teach and advocate the doctrine that the governments of New York and its various political subdivisions and agencies be overthrown by force and violence as described in the first count. The fourth count alleges a conspiracy to commit the crime alleged in the first three, Penal Law §580. Two other counts charge that Samuels and Stewart permitted premises to be used for the assemblage of persons assembled for the purpose of advocating and teaching that the governments of the State and its various political subdivisions and agencies should be overthrown by force and violence.

The complaints, based in part upon the Civil Rights Act, 42 U.S.C. §1983, seek an injunction against prosecution under the indictment or, alternatively, a declaratory judgment of invalidity, on the grounds that the New York criminal anarchy

statute, Penal Law §§160, 161 and 163, violated the First Amendment of the Constitution of the United States, made applicable to New York by the Fourteenth, and entered an area exclusively occupied by the Federal Government, see Pennsylvania v. Nelson, 350 U.S. 497 (1956). They also attack §596.3 of New York's Judiciary Law requiring that a juror "be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value" as violating requirements of the Federal Constitution that a person may be indicted only by a grand jury representing a fair cross-section of the community,[3] and §586.6, now §596.5, of the Judiciary Law in that it furnished no definable standards as to how grand jurors were to be selected. The defendants answered, seeking dismissal of the complaints. Finding that the complaints raised substantial questions under the Constitution, Judge Bryan requested the convocation of a court of three judges, 28 U.S.C. §§2281 and 2284. We now have before us motions by the plaintiffs both for a preliminary injunction against continuation of the prosecution and for summary judgment.

The New York criminal anarchy statute is an old one, going back to 1902. Its enactment was a response to the assassination of President McKinley in Buffalo the preceding year, see People v. Gitlow, 234 N.Y. 132, 156 (1922) (dissenting opinion of Judge Pound). The language was very broad. Section 160 defined criminal anarchy:

> Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means.

and made "the advocacy of such doctrine either by word of mouth or writing" a felony, without, however, prescribing a penalty. Section 161[4] spelled out various types of acts within this general concept which constitute felonies punishable by imprisonment for not more than 10 years, fine of not more than $5,000, or both. Section 162 forbade assemblages of two or more persons for advocating or teaching criminal anarchy, and §163 forbade permitting such an assemblage—this being a misdemeanor punishable by imprisonment for not more than 2 years, fine of not more than $2,000, or both. Under the new Penal Law, effective September 1, 1967, the various criminal anarchy sections are combined in a single provision reading as follows:

> §240.15 Criminal anarchy
>
> A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow.

Plaintiffs mount a double-barreled attack on the old statute. They say that although its constitutionality was sustained in Gitlow v. New York, 268 U.S. 652 (1925), over a dissent by Justices Holmes and Brandeis, later decisions of the Supreme Court, notably Dennis v. United States, 341 U.S. 494, 507-11 (1951), and Yates v. United States, 354 U.S. 298, 318-19 (1957), render it plain that *Gitlow* has been overruled and that a statute making the teaching or advocacy of anarchy a

crime can be constitutional only if limited to those words or acts aimed at the violent overthrow of government which, as said in Schenck v. United States, 249 U.S. 47, 52 (1919), create "a clear and present danger that they will bring about the substantive evils" the legislature "has a right to prevent"—as, indeed, the New York Court of Appeals has recently recognized. People v. Epton, 19 N.Y. 2d 496, 281 N.Y.S. 2d 9 (1967), cert. denied and appeal dismissed for want of a substantial federal question, 390 U.S. 29 (1968). They add that the unconstitutionality of §§160-163 would not be removed even if—as they dispute—the instant indictment required proof of facts within the *Schenck-Dennis* formulation, since the overbreadth of the statute would have a "chilling effect" on persons desiring to engage in teaching or advocacy in the area between the central core that might be constitutionally forbidden and the broader circumference to which the statute extends. For this they find support in such decisions of the Supreme Court as Dombrowski v. Pfister, 380 U.S. 479 (1965), and Keyishian v. Board of Regents, 385 U.S. 589 (1967), and in the decisions of three judge courts invalidating the Mississippi, Kentucky and California Criminal Syndicalism Acts, Ware v. Nichols, 268 F. Supp. 564 (D. Miss. 1967); Baker v. Bindner, 274 F. Supp. 658 (W.D. Ky. 1967); Harris v. Younger, 281 F. Supp. 507 (C.D. Cal. 1968). They contend in addition that the language of the former New York statute was broad enough to include teaching or advocating the overthrow of the Federal Government, a field held in Pennsylvania v. Nelson, *supra*, to have been preempted against the states by the Smith Act, 18 U.S.C. §2385; indeed they point to a passage in one of the two majority opinions of the Court of Appeals in *Gitlow* which construed New York's criminal anarchy statute as extending that far, 234 N.Y. at 138 (opinion of Judge Crane). Against the point that

the superseding indictment charged only attempting to overthrow state and local governments, they again argue overbreadth.

The State responds that, however all this might have been if the case had come to us some years back, plaintiffs' arguments are drained of their force by the decision of the Court of Appeals in *Epton*. Taking note of constitutional development in the forty-five years since its decision in People v. Gitlow, *supra*, that court, with Judge Burke dissenting, reinterpreted the criminal anarchy statute "in accordance with sound constitutional principles so as to preserve its constitutionality," 19 N.Y. 2d at 505, 281 N.Y.S. 2d at 16. It held that the statute must be read as requiring not merely advocacy or teaching of violent overthrow of the government by force and violence but an intent to accomplish the overthrow and a "clear and present danger" that the advocated overthrow may be attempted or accomplished, 19 N.Y. 2d at 506, 281 N.Y.S. 2d at 17.[5] It held also, as we read the opinion, 19 N.Y. 2d at 507, 281 N.Y.S. 2d at 17-18, that, as the new Penal Code makes plain, the old statute also must be confined to attempted overthrow of the government of New York or a local subdivision, thereby saving it from successful attack on preemption grounds, Uphaus v. Wyman, 360 U.S. 72, 76-77 (1959); DeGregory v. Att'y General of New Hampshire, 383 U.S. 825, 829-30 (1966).

Far from welcoming this restriction of the area of permissible prosecution under the criminal anarchy statute, the plaintiffs protest it. They contend that the Court of Appeals had no power in 1967 to give the statute a narrower reading than the same court had found in 1922 to be the intent of the legislature of 1902. We do not understand why; it seems quite reasonable for the court to have ruled that if the 1902 legislature had known it could not have all it wanted, it would have wanted

all it could have. Time and again the Supreme Court has narrowed the language of Congressional acts to save their constitutionality, see, e.g., Schneiderman v. United States, 320 U.S. 118 (1943), Bridges v. Wixon, 326 U.S. 135 (1945), and, most notably in the present context, in the case of the Smith Act whose language is nearly identical with the New York statute, see Dennis v. United States, *supra*, 341 U.S. at 502-11. We are unable to discern why an earlier broader reading should bar that course. In any event if the Court of Appeals transcended the powers vested in it by the people of New York by narrowing its previous construction of the criminal anarchy statute, which we in no way intimate, this would be entirely a matter of state law and not one of federal concern.

Plaintiffs argue further, relying particularly on Dombrowski v. Pfister, *supra*, that, even if *Epton* would be a sufficient answer as to future criminal activity, the New York statute had not been thus narrowed to constitutionally permissible limits when most of the acts charged in the indictment were committed. The State counters that *Dombrowski* dealt with a situation where the statute could be brought within acceptable limits only "through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard," 380 U.S. at 491. The Court, it says, there made clear it was speaking only of a case where "the conduct charged in the indictments is not within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution," whereas here the Court of Appeals' adoption of the Supreme Court's reading of similar statutory language in *Dennis* was precisely such a construction and the acts are "the sort of 'hard-core' conduct that would obviously be prohibited under any

construction." 380 U.S. at 491-92. The State caps its argument by citing a footnote in *Dombrowski* where the Court added, 380 U.S. at 491 n. 7:

> Our cases indicate that once an acceptable limiting construction is obtained, it may be applied to conduct prior to the construction, see Poulos v. New Hampshire, 345 U.S. 395; Cox v. New Hampshire, 312 U.S. 569; Winters v. New York, 333 U.S. 507, provided such application affords fair warning to the defendants, see Lanzetta v. New Jersey, 306 U.S. 451; cf. Harrison v. NAACP, 360 U.S. 167, 179.

Plaintiffs contend that as to them the proviso as to "fair warning" was not met. In one sense it clearly was. Since the statute embraced more than it permissibly could embrace, it surely embraced the "hard-core" activities with which they are charged. Cf. Winters v. New York, 333 U.S. 507 (1948). Although an unduly broad statute is objectionable on other grounds, lack of fair warning is not one; the case differs essentially from the unduly vague statute like that in Lanzetta v. New Jersey [belonging to a "gang"], which the Court's footnote cited as an example. Plaintiffs' point is a rather different one. Until *Epton*, they say, they had every reason to believe the New York criminal anarchy statute as construed by the Court of Appeals in *Gitlow* was unconstitutional. The *Dennis* opinion indicated this, no attempt at enforcement or amendment had been made thereafter, and they could not reasonably have anticipated that the Court of Appeals by overruling its earlier decision would restore life to an act that was moribund. Although under *Dombrowski* persons engaging in "hard-core" activities take their chances on "an acceptable limiting construction readily to be anticipated as the result of a single criminal

prosecution," it is unreasonable, they say, to apply this rule when the statute has once been broadly construed by the highest court of the state even though—or perhaps particularly because—that construction would render the statute void under current constitutional doctrine.

The argument strikes us as somewhat artificial. The case is not like James v. United States, 366 U.S. 213, 221-22, 241, 242-47 (1961), where defendants were charged with wilfully failing to report income resulting from embezzlement which an earlier decision, never expressly overruled, had held they were not required to report. No court of New York had ever told the defendants they could engage in the type of activity charged in the indictment with impunity. The alleged non-enforcement of the New York criminal anarchy statute did not have the effect that might reasonably have been attributed to Connecticut's "undeviating policy" of non-enforcement of its anti-contraceptive statute in the face of flagrant violation, which could well have led citizens to believe they could flout the statute without risk of prosecution. See Poe v. Ullman, 367 U.S. 497, 502 (1961). Neither the complaints nor the moving affidavits allege that plaintiffs entertained the beliefs their lawyers now ingeniously impute to them and, for reasons indicated, we do not understand why the *Epton* decision was not expectable. In any event this point, which would require an examination of defendants' state of mind, is the sort of issue that becomes ripe for constitutional adjudication only upon a fully developed record, see Eccles v. People's Bank, 333 U.S. 426, 434 (1948) (Frankfurter, J.); Wright, Federal Courts 391-92 (1963), cf. Bickel, The Least Dangerous Branch, ch. 4 (1962); United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947), and would afford no basis for declaratory or, *a fortiori*, injunctive[7] relief.

Even if we should be wrong on this last point or as to plaintiffs' other arguments that *Epton* could not validate application of the old statute to them, see footnote 5, we would still consider the grant of such relief inappropriate under the special circumstances here presented. In saying this we are fully aware of the directives recently given by the Supreme Court, not only in Dombrowski v. Pfister, *supra*, but also in such cases as McNeese v. Board of Education, 373 U.S. 668 (1963), and Zwickler v. Koota, 389 U.S. 241 (1967), see also Cameron v. Johnson, 390 U.S. 611 (1968). However, the common thread running through all these cases—the need of federal declaratory or injunctive relief to protect plaintiffs' constitutional rights with respect to future conduct or events—is wholly absent here. The presently effective New York criminal anarchy statute, Penal Law §240.15,[8] read in light of *Epton*, does not unconstitutionally restrict the First Amendment rights of these plaintiffs or of anyone else. We do not think that the Court in *Zwickler* had any intention to overrule the basic principles governing the propriety of declaratory or injunctive relief and to require a federal court to render a declaratory judgment whenever a present or prospective defendant shows that application of a state criminal statute to him would violate a constitutional right, even though there is no possibility that presenting the defense in a pending prosecution and seeking review in the Supreme Court if it is there rejected would "effect the impermissible chilling of the very constitutional right he seeks to protect." 389 U.S. at 252. Such a view would run directly counter to the discussion in *Dombrowski*, 380 U.S. at 483-85. See also Pub. Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 243-44 (1952); Borchard, Declaratory Judgments 1022 (2d ed. 1941). *Zwickler* was a classic case for declaratory relief; the plaintiff needed to know promptly

whether he could distribute anonymous handbills free of New York's threat of punishment. But, with New York law changed as it has been, the instant plaintiffs will not suffer any impairment of First Amendment rights to denounce the government of the state or its subdivisions if they must wait for a federal answer as regards conduct long since past until the state has determined what acts, alleged to be punishable under the statute and the Constitution, they have in fact committed. While their prospect of success in the New York courts may not be bright in view of *Epton*, in this instance Supreme Court review affords wholly adequate relief. See also Zwicker v. Boll, 36 L.W. 3440-41 (May 20, 1968).

We are not persuaded to a different view by plaintiffs' apprehension that if they should be found guilty on other counts of the indictment, New York might seek to frustrate an appeal to the Supreme Court, as they contend it did in *Epton*, by making their sentences on the criminal anarchy counts concurrent with those on other counts. Not only is this entirely speculative but even if New York should do what plaintiffs fear and the Supreme Court should dismiss their appeal as it did in *Epton*, the Court would do that only because it felt there was no cause for federal concern. New York would have punished the plaintiffs for crimes—illegally possessing weapons and conspiring to commit arson—within its power, and, in light of the new statute and *Epton*, its doing so would have no "chilling effect" on persons desiring now or in the future to teach or advocate the overthrow of government within constitutional bounds. Plaintiffs' fear that New York will use an overbroad criminal anarchy statute in bad faith as a weapon for restraining constitutionally protected speech, while avoiding Supreme Court review, ignores that New York

cannot do this so long as *Epton* stands. In contrast to Keyishan v. Board of Regents, *supra*, we do have the benefit of a "judicial gloss," 385 U.S. at 601—and of a greatly simplified statute as well.

There remain the plaintiffs' two challenges, going to the entire indictment, which concern New York's method of selecting grand jurors. We have little doubt that, despite the decision of this court in United States v. Foster, 83 F. Supp. 197 (S.D. N.Y. 1949), cf. Fay v. New York, 332 U.S. 259, 291-94 (1947), application of even a modest property qualification for grand jurors might now be held unconstitutional, cf. Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); Labat v. Bennet, 365 F. 2d 698, 723 (5 Cir. 1966), cf. Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), and New York has acted wisely in abolishing it, see fn. 3. However, the defendants have submitted an affidavit by the County Clerk of Queens County that the property requirement had no significance in his selection of jurors since he has long proceeded on the theory, whether factually correct or not, that everyone possessed the minimal amount of property specified. We find far less force in plaintiffs' attack on former subdivision 6, now 5, of §596 of the Judiciary Law providing that to serve as a grand juror, a person must ". . .be intelligent; of sound mind and good character; well informed. . . ," in the absence of evidence of abuse, see Swain v. Alabama, 380 U.S. 202, 205-06, 209 (1965); Chestnut v. New York, 370 F. 2d 1, 7 at n. 13 (2 Cir. 1966), cert. denied, 386 U.S. 1009 (1967). Rabinowitz v. United States, 366 F. 2d 34 (5 Cir. 1966), on which plaintiffs rely, did not hold such standards to be unconstitutional; the decision went rather on the ground that the clerk and the jury commissioner had superimposed additional standards of their own.

designed in part to diminish the number of negro jurors, on the uniform standards enacted by Congress in 1957, 28 U.S.C. §1861. However all this may be, we see no reason why plaintiffs' contentions as to grand jury selection cannot be effectively presented in the New York courts and to the Supreme Court on review. Douglas v. City of Jeannette, 317 U.S. 157 (1943); Stefanelli v. Minard, 342 U.S. 117 (1951). Indeed, these questions, going to the validity of this and many other indictments, seem peculiarly a matter to be determined by the state courts in the first instance. Chestnut v. New York, *supra*, 370 F. 2d at 6-8; U.S. ex rel. Epton v. Nenna, 281 F. Supp. 388, 390 (S.D.N.Y. 1968).

Since the complaints present no case for federal relief, the Clerk is directed to enter a judgment of dismissal, as prayed by the State.

/s/ Henry J. Friendly
U.S.C.J.

/s/ Frederick v. P. Bryan
U.S.D.J.

/s/ Inzer B. Wyatt
U.S.D.J.

26 June 1968.

JUDGMENT ENTERED 6-27-68

/s/ John J. Olear, Jr.
Clerk

Opinion of the District Court

Footnotes

1 The Fernandez action was brought in the Eastern District of New York and transferred here by consent.

2 All references are to the former Penal Law, repealed September 1, 1967, unless otherwise stated.

3 Since subdivision 3 was repealed, effective September 1, 1967, plaintiffs' attack is necessarily limited to the State grand jury. Although the superseding indictment was filed thereafter, counsel advised us that this was returned by the same grand jury that had rendered the original indictment.

4 Sec. 161. Advocacy of criminal anarchy

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrine of criminal anarchy; or

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

5 We reject plaintiffs' claims that, even after *Epton*, the statutes under which they have been indicted are still unconstitutionally vague in scope. Four of their arguments merit discussion. First, while *Epton* does not expressly state that only when the speaker uses language that *incites to action* may he be prosecuted under Secs. 160 and 161, see Yates v. United States, *id.* at 320-25.

Footnotes *(Cont'd)*

in the *Gitlow* case itself, both the Court of Appeals, 234 N.Y. at 149, and the Supreme Court, 268 U.S. at 664-65, so construed the statute. Though the indictment in the present case does not expressly charge incitement—indeed its charge that the defendants advocated the "duty" and "necessity" of overthrow was expressly held inadequate in *Yates, id.* at 324—it is the indictment, not the statute, that is overly broad in this respect. Second, while the Court of Appeals did not expressly deal with those clauses in Secs. 160 and 161 that prohibit the advocacy of overthrow "by any unlawful means" other than force and violence, the fair implication is that these provisions have been read out of the statute. Third, we think it apparent that the same principle of construction applied in *Epton* would limit the relevant portion of Sec. 161-4 to becoming a member with knowledge that the society advocates the overthrow of government by force and violence and intends that this be accomplished. Contrast United States v. Robel, 389 U.S. 258 (1967). Finally, while the *Epton* court had no occasion to construe old Sec. 163 which forbade any owner, agent or occupant "willingly and knowingly" to permit two or more anarchists the use of premises under his control, it follows under the principles of the *Epton* decision that to violate Sec. 163 one must know of the present danger of violence.

6 While Epton necessarily decided this issue adversely to the plaintiffs' argument, we cannot be certain whether the Supreme Court in dismissing the appeal, 390 U.S. 29, passed on that point or rested decision on the concurrent sentences on other counts.

7 The question whether the provision in the Civil Rights Act, now 42 U.S.C. Sec. 1983, authorizing a "suit in equity," brings that statute within the exception of the anti-injunction statute, 28 U.S.C. Sec. 2283, "except as expressly authorized by Act of Congress," is one of great consequence on which inferior federal judges have sharply differed and the Supreme Court has not found occasion to rule. See Dombrowski v. Pfister, *supra*, 380 U.S. at 484 n. 2; Cameron v. Johnson, 381 U.S. 741 (1965) and 390 U.S. 611 n. 3 (majority opinion) and n. 5 (dissenting opinion) (1968). Cf. City of Greenwood v. Peacock, 383 U.S. 808, 829, 852-53 (1966). The American Law Institute has proposed a much more limited exception, Study of the Division of Jurisdiction between State and Federal Courts, Sec. 1372(7), Tent. Draft No. 6 (1968).

8 The new statute, among other things, eliminates the "any unlawful means" language of Sec. 161-1 and 2, and the assemblage clause, Sec. 163, and makes clear that membership is punishable only if accompanied by knowledge of the organization's purpose to advocate violent overthrow—in the *Epton* sense.